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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

PATRICK M . et al.,

Plaintiffs and Appellants,

v.

COUNTY OF VENTURA, et al.,

Defendants and Respondents.

2d Civil No. B173748
(Super. Ct. No. CIV 214578)
(Ventura County)

This action for malicious prosecution was filed after the Ventura County Human Services Agency investigated a reported child sexual abuse, filed juvenile dependency petitions, and dismissed the petitions at a contested hearing. Patrick M., and his parents, Margaret M. and Ronald M., appeal from the summary judgment granted in favor of respondents, County of Ventura and Assistant County Counsel Patricia McCourt. The trial court concluded that there were no triable facts that respondents maliciously fabricated or concealed evidence within the meaning of Government Code, section 820.21.[1] We affirm.

[1] Unless otherwise stated, all statutory references are to the Government Code.

Facts and Procedural History

On April 26, 2001, Margaret M. (Margaret) reported that a child (R.H.) at her daycare facility had accused Margaret's 12 year old son, Patrick M., of sexually molesting another child (S.G.). Sheryl Perry, a caseworker for the Ventura County Human Services Agency, and a police detective interviewed everyone at the daycare center including Patrick, R.H., and the alleged victim, S.G. The victim, age five, stated that Patrick placed his penis above her abdomen and took her pants off while trying to "open up her private parts." Patrick would not let her out of the room until she took her panties off. Later that day, the victim told her mother that she had to take a shower and wash everything in her backpack.

Perry requested that Margaret and Ronald place Patrick with his grandparents because he posed a substantial risk of harm to his sisters, Tessa and Charlotte. Margaret and Ronald refused to separate the children Perry filed juvenile dependency petitions to remove the sisters. At the May 7, 2001 detention hearing, Margaret and Ronald agreed to place Patrick with his grandparents.

After the hearing, the dependency matter was assigned to caseworker Janae Williams. Williams conducted her own investigation and opined that Patrick's sisters were not at substantial risk of harm. Respondents, however, did not dismiss the juvenile dependency petitions until the contested jurisdiction hearing, after three days of testimony.

The Governmental Claims

On March 12, 2002, appellants filed governmental claims alleging that Perry "without probable cause, filed a Juvenile Dependency Action (J-60522 & J-6052[3]) to acquire Superior Court jurisdiction using the sham reasoning that Margaret and Ronald M[.] were negligent parents because they refused to remove their only son from the family home. In addition, without probabl[e] cause and out of spite, Sheryl Perry set a hearing to have the two daughters forcibly removed from the family home."

After County denied the governmental claims, appellants sued for malicious prosecution. The first amended complaint stated that Sheryl Perry fabricated evidence for

the detention hearing. It was further alleged that respondents withheld exculpatory evidence that Patrick was under the care of a psychiatrist for Attention Deficit Hyperactivity Disorder and that the Simi Valley Police Department had concluded there was insufficient evidence to prosecute Patrick.

Sheryl Perry was dismissed from the action after she died on January 16, 2002.

Summary Judgment Motion

Respondents moved for summary judgment on the ground that there were no triable facts of malicious fabrication or suppression of evidence. The trial court, in granting the motion, found that Facts 1-3 and Facts 7-18 in respondents' separate statement of undisputed facts were not disputed. The moving papers established that the governmental claims contained no reference to falsification of evidence (Undisputed Fact #1), that Margaret reported that a child had accused Patrick of sexually molesting S.G. in daycare (Undisputed Fact #2), that a four year old at the daycare center told Simi Valley Police Detective David Del Marto that Patrick had pulled down S.G.'s pants (Undisputed Fact #3), and that S.G. told her mother that she needed to take a shower and "that Patrick should never do that again." (Undisputed Fact 7.)

The moving papers established that on May 7, 2001, the day of the detention hearing, appellants were provided copies of the dependency petitions, a six-page detention report, and a ten-page emergency narrative report containing interviews by Detective Del Marto and Perry. (Undisputed Facts #12-13.) The reports stated that Patrick was taking antipsychotic medication and that his parents, Margaret and Ronald, were in the process of divorcing. (Undisputed Fact #9.)

Section 820.21 Liability

We review the order granting summary judgment de novo to determine whether triable issues of material fact exist. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.) It is well settled that social workers have statutory immunity in the investigation and filing of dependency actions. (*Jenkins v. County of Orange* (1989) 212 Cal.App.3d 278, 283-284 [negligent investigation by social worker]; *Alicia T. v. County of Los Angeles*

(1990) 222 Cal.App.3d 869, 881 [immunity where child removed from home due to suspected child abuse].)

Section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, *even if he acts maliciously and without probable cause."* (Emphasis added.) Under the statute, a social worker is immune from liability for malicious prosecution. (*Jenkins v. County of Orange*, *supra,* 212 Cal.App.3d at p. 283; *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1211.)

In 1995, the Legislature enacted section 820.21 to narrowly limit the immunity of a social worker, who with malice, fabricates evidence or withholds exculpatory evidence.[2] The Legislative Counsel's Digest states that "the civil immunity of juvenile court social workers, child protection workers, and other public employees authorized to initiate or conduct investigations or proceedings pursuant to the juvenile court law shall not extend to acts of perjury, fabrication of evidence, failure to disclose exculpatory evidence, or obtaining testimony by duress, fraud, or undue influence if any of these acts are committed with malice, as defined." (8 Deering's Cal. Codes, Advance Legislative Service (1995) ch. 977, § 1, p. 6539.)

Section 820.21, subdivision (b) defines "'malice'" as "conduct that is intended . . . to cause injury to the plaintiff or despicable conduct that is carried on . . . with a willful and conscious disregard of the rights or safety of others." (§ 820.21, subd. (b).)

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[2] Section 820.21, subdivision (a) states in pertinent part: "Notwithstanding any other provision of the law, the civil immunity of juvenile court social workers, child protection workers, and other public employees authorized to initiate or conduct investigations or proceedings pursuant to Chapter 2 . . . shall not extend to any of the following, *if committed with malice:* [¶] (1) Perjury. [¶] (2) Fabrication of evidence. [¶] (3) Failure to disclose known exculpatory evidence." (Emphasis added.)

Appellants argue that Perry bungled the investigation and filed the dependency petitions without probable cause. Section 820.21, however, requires perjury or the malicious fabrication or concealment of evidence. The supporting and opposing papers show that Perry was reasonably concerned about the risk of harm to Patrick's sisters. Although reasonable minds may differ on whether Patrick should have been removed from the home, appellants do not deny that the victim reported that Patrick had sexually abused her.

We conclude that summary judgment was properly granted. Section 820.21 does not permit suits for the negligent investigation of a dependency matter. Absent triable facts of perjury, malicious fabrication of evidence, or the malicious concealment of exculpatory evidence, appellants may not sue for malicious prosecution. (§ 821.6; *Jenkins v. County of Orange*, *supra,* 212 Cal.App.3d at p. 283; *Amylou R. v. County of Riverside, supra,* 28 Cal.App.4th at p. 1211.)

Governmental Claim

Summary judgment was granted on the alternative ground that the governmental claims were at variance with the first amended complaint. Before a complaint for damages is filed against a governmental entity or public employee, the plaintiff must present a government claim pursuant to the California Tort Claims Act. (§ 910 et seq.) The claim must "describe what the entity is alleged to have done." (*Turner v. State of California* (1991) 232 Cal.App.3d 883, 888.) The factual circumstances set forth in the governmental claim must correspond with the facts alleged in the complaint. (*Id*., at pp. 888-889; *Crow v. State of California* (1990) 222 Cal.App.3d 192, 199.)

Here the governmental claims state: "Prior to the completion of her investigation and without probable cause to do so, Sheryl Perry demanded that Margaret remove her minor son Patrick from the house because of the fallacious opinion that Patrick placed his two sisters in substantial danger of sexual molestation. . . [¶] When Margaret refused to comply with the unlawful and unreasonable demands, Sheryl Perry became angry and without probable cause, filed a Juvenile Dependency Action . . . to acquire Superior Court

jurisdiction using the sham reasoning that Margaret and Ronald [M.] were negligent parents because they refused to remove their only son from the family home."

The trial court found that appellants were precluded from arguing that respondents maliciously fabricated or concealed evidence. It did not err. The variance between the governmental claims and the first amended complaint estopped appellants from opposing the summary judgment based on section 820.21. (Van Alstyne, Cal. Government Tort Liability Practice (4th ed. 2004), § 5.16, p. 181; *Turner v. State of California, supra,* 232 Cal.App.3d at p. 891 [summary judgment based on variance between governmental claim and complaint]; compare *Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899, 921 [breach of contract claim not reflected in governmental claim] with *Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 447-449 [governmental claim that employee was wrongfully terminated for objecting to sexual harassment of co-employee not at variance with allegation that firing violated public policy favoring free speech and opposition to public employee conflicts of interest].)

Even if the governmental claims are liberally construed in favor of appellants, the opposition papers show no triable facts of perjury or malicious fabrication and concealment of evidence. Appellants were provided copies of the detention report and the emergency narrative report of the interviews with Patrick and the victim. The detention report states that "Patrick sexually abused a 5 year old girl in mother's day care which included fondling the child's vagina, exposing himself to the child, and rubbing his penis against the child's stomach over her shirt. Patrick admits that he told the child to meet him in the bathroom with her backpack, pulled her underwear and pants on over his underwear and danced around the bathroom. He denies anything else happened in the bathroom. He denies that he pulled the child's pants down in the bedroom, even though the two other day care children who were present confirm this. . ."

The reports also include a statement by the victim that Patrick touched her private parts" and "took his clothes off; she saw his penis. He put his penis on her shirt. She pointed to the area where he put his penis which was near her belly button. . . . [¶] . . . 'He

was trying to look in my private part. He was trying to open up my private. . . . He took my pants off.'"

Appellants argue that Patrick's conduct was innocuous and there was no risk of harm to his younger sisters. *Jenkins v. County of Orange supra,* 212 Cal.App.3d 278 is analogous. There, a mother sued a social worker and county for acts that took place in the investigation of a reported child abuse. The complaint alleged that the social worker failed to consider all of the evidence and misrepresented information to the juvenile court. The Court of Appeal held that the social worker and county were immune from liability based on section 821.6. (*Id*., at p. 284.)

The same statutory immunity applies here. Perry investigated the child sexual abuse report and, right or wrong, recommended that dependency petitions be filed.[3] Based on Patrick's and the victim's statements, respondents were required to take steps to protect any minor that was at risk. (Pen. Code, § 11166, subd. (a).) "Social workers . . . must make quick decisions on incomplete information as to whether to remove a child from parental custody." (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1193.) Granting respondents "less than absolute immunity would " ' "negate the purpose of child protective services by postponing prevention of further abuse to avoid liability." ' [Citations.]" (*Ibid.*)

The dependency matter was assigned to Assistant County Counsel Mary Ward who represented the Ventura County Human Services Agency. Ward stated: "The victimization described by the two minor females to Detective [D]el Marto, set forth in detail in the detention report. . . , constituted the foundation of the petitioner's case

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[3] Perry reported: "The mother [Margaret] has filed for divorce and father [Ronald] was ordered to be out of the home on 5-1-01. The parents have an ongoing custody case in Family Court. However, the parents refuse to separate Patrick from his sisters to ensure their safety from abuse by Patrick. They also refuse to have Patrick live with any other relatives or appropriate caretakers."

throughout the proceeding through trial and supported the goal of the dependency petitions, which was either to effect implementation of a safety plan or to remove Patrick M's two minor sisters from the home."

Assistant County Counsel McCourt made three pretrial appearances on Ward's behalf. There are no triable facts that McCourt fabricated evidence or concealed evidence within the meaning of section 820.21.

Separate Statement

The trial court granted summary judgment on the alternative ground that appellants' response to the separate statement of undisputed facts was defective. Under the summary judgment statute, the opposition papers must respond to each material fact the moving party contends are undisputed. Code Civ. Proc., § 437c, subd. (b); Cal. Rules of Court, rule 342(h).) "In opposing a defendant's motion for summary judgment, the plaintiff must submit a separate statement setting forth the specific facts showing that a triable issue of material fact exists. [Citations.] Without a separate statement of undisputed facts with references to supporting evidence in the form of affidavits or declarations, it is impossible for the plaintiff to demonstrate the existence of disputed facts. [Citation.] When a fact upon which plaintiff relies is not mentioned in the separate statement, it is irrelevant that such fact might be buried in the mound of paperwork filed with the trial court; the court does not have the burden to conduct a search for facts that counsel failed to bring out. [Citation.]" *(*Lewis v. County of Sacramento *(2001) 93 Cal.App.4th 107, 116.)*

Having reviewed the opposition papers, we conclude that the response to the separate statement of undisputed facts is deficient. Appellants did not respond to the 18 undisputed facts, claimed there were other disputed facts, and failed to provide specific evidentiary citations. That alone is grounds to uphold the grant of summary judgment. (Code Civ. Proc., § 437c, subd. (b); Kaplan v. LaBarbera (1997) 58 Cal.App.4th 175, 179.)

Conclusion

As discussed, social workers have statutory immunity in the investigation and prosecution of dependency actions. (§ 821.6; *Jenkins v. County of Orange supra,* 212 Cal.App.3d at pp. 283-284.) "It is necessary to protect social workers in their vital work from the harassment of civil suits and to prevent any dilution of the protection afforded minors by the dependency provisions of the Welfare and Institutions Code. Therefore, social workers must be absolutely immune from suits alleging the improper investigation of child abuse, removal of a minor from the parental home based upon suspicion of abuse and the instigation of dependency proceedings." (*Alicia T. v. County of Los Angeles*, *supra,* 222 Cal.App.3d at p. 881.)

A weak dependency case is not to be confused with one based on perjury and fabricated evidence as defined by section 820.21. The trial court reasonably concluded there were no triable facts to support an action for malicious prosecution.

The judgment is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Steven Hintz, Judge

Superior Court County of Ventura

Law Offices of Jos A. Hackett, Joseph A. Hackett, for Appellants.

Jeffrey Held; Law Offices of Alan E. Wisotsky, for Respondents